

EXHIBIT 4

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Defendants PHARRELL WILLIAMS,
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HARRIS, JR. and Counter-Defendants
MORE WATER FROM NAZARETH
PUBLISHING, INC., PAULA MAXINE
PATTON individually and d/b/a
HADDINGTON MUSIC, STAR TRAK
ENTERTAINMENT, GEFEN
RECORDS, INTERSCOPE RECORDS,
UMG RECORDINGS, INC., and
UNIVERSAL MUSIC DISTRIBUTION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

PHARRELL WILLIAMS, an
individual; ROBIN THICKE, an
individual; and CLIFFORD HARRIS,
JR., an individual,

Plaintiffs,

vs.

BRIDGEPORT MUSIC, INC., a
Michigan corporation; FRANKIE
CHRISTIAN GAYE, an individual;
MARVIN GAYE III, an individual;
NONA MARVISA GAYE, an
individual; and DOES 1 through 10,
inclusive,

Defendants.

AND RELATED COUNTERCLAIMS.

CASE NO. CV13-06004-JAK (AGRx)
Hon. John A. Kronstadt, Ctrm 750

**AMENDED NOTICE OF DISPUTED
JURY INSTRUCTIONS**

Jury Trial:

Date: February 10, 2015
Time: 9:00 a.m.
Ctrm.: 750

Action Commenced: August 15, 2013

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1 original work *may* include elements taken from the public domain or be derivative
 2 of a prior work, copyright does not extend to any portions taken from the public
 3 domain or that are derivative of a prior work. That concept is explained fully in
 4 agreed Special Instruction No. 3: Protected Expression (*see* Exhibit A hereto) in the
 5 context in which it is relevant. Defendants’ insertion of unrelated issues in an
 6 incomplete and confusing manner in the form instruction is confusing and
 7 misleading. MCJI § 17.12 should be given unmodified as set forth in Plaintiffs’
 8 proposed instruction. Defendants have no reason to modify the model instruction.

9 **TAB 4:** The parties’ respective instructions on infringer’s profits (MCJI
 10 § 17.24) are similar other than naming conventions for the parties (“Counter-
 11 Claimants,” etc. in Defendants’ instruction as opposed to “Gaye Parties,” etc. in
 12 Plaintiffs’ instruction). The “Gaye Parties” naming convention is more jury-ready.

13 The cases cited by Plaintiffs make clear that it is a rare instance where all
 14 profits are attributable to the infringement. When all of the profits do not clearly
 15 derive from the infringing material, the copyright owner is not entitled to recover all
 16 of the profits, and apportionment of just those profits attributable to the infringing
 17 material is required. *Three Boys*, 212 F.2d at 487 (citing cases); *Frank Music Corp.*
 18 *v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1548-49 (9th Cir. 1989); *Cream*
 19 *Records, Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d 826, 828-29 (9th Cir. 1985) (“In
 20 cases such as this where an infringer’s profits are not entirely due to the
 21 infringement, and the evidence suggests some division which may rationally be used
 22 as a springboard it is the duty of the court to make some apportionment”)(quoting
 23 *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 121 (2d Cir. 1962)).

24 The last paragraph of Plaintiffs’ instruction states that unless the jury finds
 25 that all profits are attributable to the infringement, the jury must apportion damages.
 26 Defendants’ instruction states this concept in the reverse order and awards *all* profits
 27 unless some portion are not attributable to the infringement. Plaintiffs’ cite
 28 authorities in their instruction that support their wording, *i.e.*, since it is the rare case

1 where all profits are recoverable. Here, there is simply no possibility that all profits
2 are attributable to the alleged copying of Marvin Gaye’s composition since the
3 portions in the Deposit Copy alleged to be similar are only a fraction of Plaintiffs’
4 songs, including that the entire instrumental portion of Plaintiffs’ songs are not
5 found in the Deposit Copies so cannot infringe Defendants’ copyrights. Plus, there
6 was an extensive marketing campaign here, including a viral music video, that
7 contributed to the success of “Blurred Lines.” Apportionment is required here
8 (assuming Plaintiffs put on evidence to support apportionment, which they will).

9 **TAB 5:** Plaintiffs’ proposed instruction is a straightforward recitation of
10 MCJI § 17.27. It is not objectionable for any reason and should be given as written.

11 Defendants provide no grounds for using their *special* instruction on this
12 topic. Defendants’ instruction bears no resemblance to MCJI § 17.27.

13 For starters, Defendants’ instruction does not clearly set forth (or at all) the
14 two elements necessary for willful infringement: (a) acts that infringed; and
15 (b) knowledge. MCJI § 17.27. Defendants want the jury to ignore the legal
16 elements.

17 Defendants’ proposed instruction has a number of other problems (apart from
18 using the confusing “Counter-Claimants,” etc. naming conventions for the parties
19 rather than the more accessible “Gaye Parties”/ “Thicke Parties” convention).

20 The **first sentence** of Defendants’ instruction should be rejected because it
21 improperly reduces the concept of willful infringement to “knowledge” that conduct
22 was infringing—but the jury also must find that the willful infringer engage in “acts
23 that infringed” the copyright. *See* MCJI § 17.27. The legal standard is incomplete
24 as expressed in Defendants’ instruction and is intended to mislead or confuse the
25 jury.

26 The second sentence is not a correct statement of the law. There is no *per se*
27 rule that continuing to infringe after being notified of the infringement constitutes
28 willful infringement, particularly where, as here, Plaintiffs deny that their songs

1 infringe Defendants' compositions. The case relied upon by Defendants involved a
2 license to use a copyrighted work that had expired, and the infringer's use of the
3 work without a license—*i.e.*, and thus the Defendant had no argument that it had
4 right to continue exploiting the work. *See Peer Int'l Corp. v. Pausa Records, Inc.*,
5 909 F.2d 1332, 1335-35 (9th Cir. 1990). Here, there is no issue of an expired
6 license. *Peer* is inapposite. There is no rule of law that any and all use after notice
7 constitutes "willful" infringement, nor do Defendants' cases support this blanket
8 statement in the second sentence of their proposed instruction.

9 The **last sentence** of Defendants' instruction concerns deduction of overhead,
10 which is dealt with in separate instructions on damages and is confusing, redundant,
11 and argumentative when included in the instruction on willful infringement.

12 Defendants' instruction is erroneous and misleads. The Court should give
13 Plaintiffs' proposed model instruction, MCJI § 17.27, without annotation.

14 **TAB 6:** Plaintiffs' proposed instruction sets forth MCJI § 17.26 without
15 modification. It is the standard copyright instruction on innocent infringement.
16 Innocent infringement is an issue on which Plaintiffs bear the burden of proof and is
17 relevant to statutory damages as is explained to the jury in other statutory damages
18 instructions proposed by Plaintiffs and as they will be asked to determine in their
19 verdict. Plaintiffs' model instruction is appropriate, fair, and should be given here.

20 **TAB 7:** The parties have agreed on the Ninth Circuit MCJI version of
21 this instruction, MCJI § 1.11 ("Credibility of Witnesses"). [*See* Exhibit A hereto.]
22 The CACI version is longer, less concise, less clear, and duplicative of the MCJI
23 form. Two instructions are potentially confusing and, at a minimum, merely
24 cumulative. The Court should only use MCJI § 1.11 (set forth in Exhibit A hereto).

25 **TAB 8:** Defendants' specially written instruction on the inverse ratio rule
26 is inapplicable. Access is conceded here, so the inverse ratio rule is irrelevant.
27 Indeed, the parties previously agreed to stipulate to access and set forth that
28 stipulation in an agreed jury instruction, but Defendants have now withdrawn the

1 response to subpoena or other discovery request.”)). Counter-Defendants have
2 presented no proof the compositions were not published and as such, the
3 presumption associated with the registration is binding on the Court and the jury.
4 There is no need for the third paragraph of Counter-Defendants’ Proposed
5 Instruction, because as a matter of law, the registrations evidence ownership of the
6 copyrighted compositions.

7 **TAB 3**

8 Plaintiff’s Proposed Instruction is incomplete and does not define the
9 “original element” it references. Plaintiffs specifically deleted the first line of the
10 MCJI that defines “original element.” Additionally, Plaintiffs’ fails to address that
11 an original work may include or incorporate elements taken from prior works,
12 works from the public domain, or works owned by others with the owner’s
13 permission as noted in the first sentence of the Model Rule. As a result, it does not
14 fully inform the jury of all the law necessary for it to make a legally correct
15 decision.

16 The Gaye’s proposed Instruction No. 24A is a complete instruction that
17 sets forth the legally correct definition of “original element” as defined by the
18 Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499
19 U.S. 340, 345-46 (1991). Furthermore, the last sentence in instruction 24A comes
20 directly from the Ninth Circuit’s Model Instruction 17.12.

21 **TAB 4**

22 The Gayes’ Proposed Instruction accurately reflects the Ninth Circuit’s
23 framework for properly calculating actual damages.

24 Plaintiffs’ Proposed Instruction misstates how the calculation of copyright
25 damages must be made by attempting to incorrectly shift a burden from themselves
26 to the Gayes. Counter-Defendants’ Proposed Instruction puts the burden on the
27 Gayes to prove apportionment of profits. The law is clear that in proving copyright
28 damages, a plaintiff must first prove total revenue. That is the only burden on the

1 Gayes. The burden then shifts to the copyright defendant, Plaintiffs in this action, to
2 prove any deductions, including deductions related to apportionment. *Three Boys*
3 *Music Corp. v. Bolton*, 212 F.3d 477, 487 (9th Cir. 2000) (citing *Cream Records,*
4 *Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d 826, 828 (9th Cir.1985); *Gaste v.*
5 *Kaiserman*, 863 F.2d 1061 1070 (2d Cir. 1988) (finding that where there is
6 “imprecision in the computation of expenses, a court should err on the side of
7 guaranteeing the plaintiff a full recovery”). *See also Oracle Corp. v. SAP AG*, 765
8 F.3d 1081, 1087 (9th Cir. 2014); *Blizzard Entm ‘t, Inc. v. Reeves*, 2010 WL
9 4054095, at * 1 (C.D. Cal. Aug. 10,2010).

10 Plaintiffs Proposed Instruction also incorrectly states the law by saying that
11 Plaintiffs are entitled to deduct overhead expenses from the damages owed the
12 Gayes. Overhead expenses are deductible only where the overhead in question
13 contributed to sales of the infringing product, which Plaintiffs bear the burden of
14 proving. *Kamar Int’l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326,1331-32 (9th Cir. 8
15 1984). Additionally, the facts will show that Plaintiffs actions were willful. A willful
16 copyright infringer is not entitled to a deduction of overhead expenses. *FrankMusic*
17 *Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 11 505, 515 (9th Cir. 1985). *See*
18 *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087 (9th Cir. 2014); *Blizzard Entm ‘t, Inc.*
19 *v. Reeves*, 2010 WL 4054095, at * 1 (C.D. Cal. Aug. 10,2010).

20 **TAB 5**

21 Plaintiffs’ Proposed Instruction 17.27 is incomplete as to the definition of
22 “willful”. As discussed, in both TAB 11 and TAB 12, the jury must be given a full
23 picture of the statutory damages framework.

24 The Gayes’ Proposed Supplemental Instruction 3 sets forth the Ninth
25 Circuit’s definition of “willful infringement.” *See Three Boys Music Corp. v.*
26 *Bolton*, 212 F.3d 477,487 (9th Cir. 2000)); *Peer Int’l Corp. v. Pausa Records, Inc.*,
27 909 F.2d 1332, 1335-36 (9th Cir. 1990)(“The court found the infringements were
28 willful because of ‘Mr. Newman’s deposition testimony that defendants received

1 the December 26, 1984 notice of termination, failed to account for and pay royalties,
2 yet nevertheless continued to manufacture and distribute phonorecords.”’); *Frank*
3 *Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 13 515 (9th Cir. 1985);
4 *Kamar Int’l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1331-32 14 (9th Cir. 1984).
5 Furthermore, the Gayes’ Proposed Instruction properly relies on the Comment to
6 Model Instruction 17.27 and the authorities states therein.

7 Although neither the Copyright Act nor its legislative history defines
8 “willful,” the Ninth Circuit defined willful as the defendant’s
9 “knowledge that the defendants” conduct constituted an act of
10 infringement.’ Accordingly, this instruction reflects that decision. To
11 refute evidence of willful infringement, the defendant must “not only
12 establish its good faith belief in the innocence of its conduct, it must
13 also show that it was reasonable in holding such a belief.” *Peer Int’l.*
14 *Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335-36, n.3 (9th
15 Cir.1990) (a defendant who ignored the revocation of its license to a
16 copyrighted work and continued to use the work after the revocation,
17 willfully infringed that work). *Columbia Pictures Television v. Krypton*
18 *Broad. of Birmingham, Inc.*, 106 F.3d 284, 293 (9th Cir.1997)
19 (“Willful” means acting “with knowledge that [one’s] conduct
20 constitutes copyright infringement.”), rev’d on other grounds, *Feltner*
21 *v. Columbia Pictures Television, Inc.*, 523 U.S.340 (1998).

22 Generally, deductions of defendant’s expenses are denied where the
23 defendant’s infringement is willful or deliberate. *Kamar Int’l, Inc. v. Russ*
24 *Berrie & Co.*, 752 F.2d 1326, 1331-32 (9th Cir.1984). A finding of
25 willfulness can also be made in connection with an assessment of defendant’s
26 profits, even though reference to willful infringement is made only in
27 connection with statutory damages. See, e.g., *Three Boys Music Corp. v.*
28 *Bolton*, 212 F.3d 477, 487 (9th Cir.2000) (In case involving jury

1 determination of allocation of defendant's profits, the Ninth Circuit noted in
2 connection with 17 U.S.C. § 504(b) damages that "non-willful infringers"
3 were entitled to deduct income taxes and management fees actually paid).

4 Continued use of a work even after one has been notified of his or her
5 alleged infringement does not constitute willfulness so long as one believes
6 reasonably, and in good faith, that he or she is not infringing. *Evergreen*
7 *Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1228 (9th Cir. 2012)
8 (relying on *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381,
9 1392(6th Cir.1996) (en banc), *cert. denied*, 520 U.S. 1156, 117 S.Ct. 1336,
10 137 L.Ed.2d 495 (1997) ("[W]e cannot say that the defendants' belief that
11 their copying constituted fair use was so unreasonable as to bespeak
12 willfulness."); *see also Danjaq*, 263 F.3d at 959; 4 Melville B. Nimmer &
13 David Nimmer, *Nimmer on Copyright* § 14.04 (Matthew Bender rev. ed.
14 2012) ("[O]ne who has been notified that his conduct constitutes copyright
15 infringement, but who reasonably and in good faith believes the contrary, is
16 not 'willful' for these purposes.") (footnotes omitted)). There is no good faith
17 or reasonability in this case. After spending months discussing their willful
18 infringement, after receiving notice, Plaintiffs filed this lawsuit. Nonetheless,
19 even after being put on notice, Plaintiffs continued to make public statements
20 about infringement and then changed their tune after initiating this action.
21 Plaintiffs actions were not in good faith and do not indicate a reasonable
22 belief that their continued infringement was not willful. This instruction is, as
23 a result, incomplete.

24 **TAB 6**

25 Plaintiffs' Proposed Instruction is an incorrect recitation of the claims and
26 defenses at issue in this action as offered. Defendants would withdraw their
27 objection if the Court were to offer an explanation of the purpose of a finding of
28 innocent infringement with a proper complementary instruction that it only relates to